SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 776

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE ESTATE OF ISAAC REESE, DECEASED, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

D. M. POWELL,
Counsel for Petitioner.

CLAUDE E. HAMILTON, JR.,
POWELL & HAMILTON,
Of Counsel.

INDEX.

Table of Cases.

Statutes and Constitutional Provisions Cited.

Other Authorities Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 776

DEALER'S TRANSPORT COMPANY,

Petitioner,

vs.

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE ESTATE OF ISAAC REESE, DECEASED, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AND ARGUMENT.

Briefly stated petitioner contends:

1. Constructive service under Section 199, Title 7 of the Alabama Code can be had only:

(a) Where the motor vehicle is actually operated by a non-resident.

(b) Where the motor vehicle is *owned* by non-resident and is actually being *operated* by such *non-resident owner*, or his, their or its agent.

Operation.

The only term used in the Alabama Statute authorizing constructive service on the Secretary of State is the word "operation." The only provision authorizing such service refers to the *operation* of the motor vehicle, in the first instance by a non-resident of the State and in the second instance *operation* by the *non-resident owner* or by the *agent* of the *non-resident owner*.

In either case, the word "operation" in every reported case is construed to mean *a personal act* in working the mechanism of the car. The first sub-division of the act relates to the operation of the motor vehicle by the non-resident himself.

In the instant case, Clark was the non-resident operating the vehicle. He was personally working the mechanism of the car.

Petitioner could not be brought into Court by service on the Secretary of State under the first sub-division of the act because Clark and not petitioner was personally operating the car. He was working it mechanism.

Flynn v. *Kramer*, 271 Michigan 500, 261 N. W. 77.

Ownership.

Under the second sub-division of the act, the car had to be operated by the owner, or the owner's agent. Clark was the person actually operating the motor vehicle at the time of the accident. He was the employee of petitioner, but petitioner was not the *owner* of the car. Under this sub-division, constructive service could not be had unless the non-resident *owner* was actually operating the car, that is, working its mechanism, or unless Clark, who actually operated the car, was the agent of the *non-resident owner*. If petitioner was not the non-resident *owner* of the car, service upon the Secretary of State as its agent was void because

such service could be had only in those cases where the non-resident was *owner* of the vehicle and was operating it either in person or by agent.

The undisputed evidence shows that the United States was the *owner* of the motor vehicle and it was so held in the opinion rendered by the Circuit Court of Appeals.

The Alabama Statute is in derogation of the common law and must be strictly construed. Such statutes can not be extended by implication to non-residents not coming within their terms.

> See *Jermaine* v. *Graf* (1939) 225 Iowa 1063, 283 N. W. 428 and other authorities cited on page 27 of brief and argument in support of petition for certiorari.

In their opinion, the Circuit Court of Appeals hold in effect that petitioner was the principal and Clark was its agent in the operation of the motor truck, that this being true the question of ownership was not involved. By their decision they read into the act a provision to the effect that the operation by the agent of a non-resident principal authorizes constructive service upon the Secretary of State, although such principal was not the *owner* of the motor vehicle involved in the accident.

Counsel for respondents attempt no defense of the opinion. By their silence they tacitly admit the grounds upon which the opinion is based are wrong. Instead of defending the opinion they are urging affirmance on the very grounds rejected by the Court of Appeals in their opinion, viz:—That Petitioner, Dealer's Transport Company, and not the United States, was *owner* of the motor vehicle involved in the accident.

They in effect admit that, unless Petitioner was owner of the motor vehicle driven by Clark at the time of the accident, service on the Secretary of State was void.

Ignoring the fact that the statute is in derogation of the common law and must be strictly construed, they give to the word "owner" the broadest of definitions and place upon it a construction clearly in conflict with the plain meaning of the statute. The question is not the meaning that may be given to the word "owner" under varying circumstances and conditions, but what is its meaning as used in the act.

Evidently one purpose of the Act was to reach by constructive service the non-resident owner of the vehicle, where it was operated by his or its agent in the State, it being a matter of common knowledge that many such non-resident owners were solvent and could be made to respond in damages, whereas the operating agent might be insolvent. Thus construed the legislature meant the real owner.

In *Caminetti* v. *U. S.*, 242 U. S. 485-6, the Supreme Court tersely announces the following rule of construction of words:

> "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense and with the meaning commonly attributed to them."

There is nothing in the constructive service statute suggesting that the word "owner" is to be used in any other manner than in its ordinary and usual sense.

Webster's New International Dictionary defines the word "owner" as follows:

> "One who owns, a proprietor, one who has the legal or rightful title, whether the possessor or not."

50 C. J., Sec. 53, page 779, defines "ownership" as follows:

> "'Ownership' differs from 'operation, maintenance or possession', in that ownership is continuous, while operate, maintenance or possession may be temporary."

Under this sensible definition, ownership of the truck was unquestionably in the United States. This would be true even through the provisions of the act as to ownership were not surplusage as held by that court.

Following the doctrine of strict construction, the United States' ownership of the truck was continuous, while that of Dealer's Transport Company was merely one of temporary possession and operation. The statute does not contemplate two ownerships. It plainly means a continuous ownership as distinguished from temporary possession and operation.

There is nothing in the testimony to in the least sustain the contention that by accepting the truck, the Dealer's Transport Company became its owner. Instead it became bailee of the property without any change of *ownership or title.*

A contract with a common carrier "for the carriage of property is a form or specie of bailment and the law of carriers, *in so far as the transportation of property is concerned,* is a development and extension of this phase of the law of bailment." (Emphasis supplied) 9 Am. Juris. 429.

> "Where one with the legal title to property becomes the bailor thereof, the contract of bailment does not contemplate *any change in such title and it remains in the bailor.*" (Emphasis supplied) 6 Am. Jur. 211.

The United States had title to the truck. It was delivered to Dealer's Transport Company for transportation. Thereby the United States became the bailor and the Dealer's Transport Company became the bailee. The title still remained in the United States, the bailor, and it was still the owner of the truck.

Under the facts shown by the record, respondents' contention that Dealer's Transport Company became the owner of the truck when it was received for transportation and

at the time the accident occurred, cannot be sustained without interpolating into the act what is known as a fiction of law. If this is done the plain and ordinary meaning of the word "owner" will be changed without anything in the act indicating such legislative purpose. It can not be done without reading into the act a provision that would destroy its plain meaning as to the real owner and substituting therefor a special meaning that the wording of the statute does not justify.

No wonder the Circuit Court of Appeals avoided basing their opinion upon the question of ownership. To sustain their contention Counsel assert that the words "possession" and "ownership" are interchangable and that one who has possession of property is its owner. If this be true, the truck had four owners instead of one:—

(1) The United States; (2) The agent of the government delivering the truck to Clark for transportation; (3) Dealer's Transport Company; (4) Clark, the driver. Successively each had possession.

Following its delivery Clark was the owner of the truck at the time of the accident. He alone was in the actual possession of it. He was both owner and operator.

The Court can readily see the absurdities to which the argument leads.

There is nothing in the evidence showing the United States in any way relinquished its ownership to its agents. The truck was delivered to the agent of Dealer's Transport Company, under agreement with the *owner* that it would be delivered for the *owner* under the government bill of lading to the government's agent at the Air Base in New Orleans.

It is conceded that this made the government bailor and Dealer's Transport Company, bailee of the truck. The legal title was in the bailor and the contract of bailment did

not contemplate any change in the title but it remained in the bailor. 6 Am. Jur. 211.

The question is not how many varied meanings may be given, but what was the real meaning intended of the word "owner" by the legislature.

Had the truck in question been owned by the Chevrolet Company, a non-resident, and it had employed Dealer's Transport Company to deliver it to a customer in New Orleans, and that Company had entrusted its delivery to its employee, Clark, what would have been the status of the parties had the accident occurred as detailed by the evidence in this case? In bringing suit, would counsel for respondents have eliminated the Chevrolet Company and sued Dealer's Transport Company and Clark and had Dealer's Transport Company made a party as owner by service upon the Secretary of State, or would they have also sued Chevrolet Motor Company and brought it into court by service of process upon the Secretary of State averring that it was the owner of the truck? There can be but one candid answer to this question. Certainly under those facts, the Dealer's Transport Company would not be the owner of the truck, but both it and Clark would have been agent and sub-agent of the Chevrolet Company. If in such case suit were desired against Dealer's Transport Company, service would not have been had on the Secretary of State, because it was not owner of the truck. The Chevrolet Company would have been the owner and bailor and Dealer's Transport Company and Clark would have been the bailees, and agents.

> "If the nature of the business is such that it must be contemplated by the principal that the authority conferred on the agent will be exercised through subagents, a power in the agent to delegate that authority will be implied. 2 Am. Jur. Sec. 197, page 156.

Being a corporation, the actual delivery of the trucks had to be entrusted to an agent. The delegation of Clark to deliver the trucks made him not only an agent of Dealer's Transport Company but also of the Government. A subagent, as well as an agent, bears a fiduciary relationship to the principal. 2 Am. Jur. Sec. 202, page 161.

In support of their contention, counsel cites the cases of *Lockhart* v. *The State*, 6 Ala. App. 62 and *Melvin* v. *Scowley*, 213 Ala. 414. These cases are not in conflict with petitioner's contention on the question of ownership. These cases merely hold that in certain instances the word "own" may be construed to mean possess where the possession instead of ownership is the main point in issue.

Counsel cite *Scandinavia Belting Company* v. *Asbestos & Rubber Works*, 257 F. 954, in support of their contention.

We do not disagree with them as to the established rule there announced governing the construction of statutes to the effect that they are to have a rational and sensible interpretation. In the same case, page 955, the Court gives the following definition of ownership:

> "Ownership is the right by which a thing belongs to one in particular to the exclusion of all others."

The ownership of the truck belonged to the United States to the exclusion of all others.

It is true that a bailee in possession of property may avail himself of any legal means to defend it as against all persons other than the bailor or owner. But this is in subordination to the rights of the owner or bailor. It does not destroy the ownership of the real owner. Certainly the statute did not have reference to the bailee of the real owner of the property, the United States in the instant case, and could not have mean that the bailee was the owner of the motor vehicle, who could be brought into court by constructive service on the Secretary of State.

Certainly the word "possess" or "possessor" can not be held to be synonymous with the word "owner" as used in the statute under discussion. As applied to the statute they are not interchangeable. The words of the second division of the Act are as follows:

> "* * * or the operation on a public highway in this State of a motor vehicle owned by any non-resident and being operated by such non-resident," etc.

If the word "possess" can be used interchangeably and mean the same as the word "owner", then that part of the Act as above quoted could read as follows:

> "* * * or the operation on a public highway in this State of a motor vehicle possessed by any non-resident and being operated by such non-resident, or agent," etc.

By contrasting them the Court will readily see that the two words do not mean the same thing. If the word "possess" had been used instead of "owned", in the statute, it would have been of much wider signification, because as used in that sense anyone possessed of the automobile, regardless of ownership or title, would be subject to substituted service.

On the other hand, if "possess" and "owned" mean one and the same thing, then the defendant, James Olan Clark, was the owner of the truck because at the time of the accident he possessed it.

The effort of counsel to show that the words "possession" and "ownership" mean the same thing and that the possessor of personal property is its owner suggests the story of the farmer's son, who went to college and studied logic. On his return home he informed his father that by the rules of logic he could prove that a magpie was a pigeon. His process of reasoning was: Magpie and jackpie were the feminine and masculine of that bird and therefore the same,

that a magpie was a jackpie, a jackpie was a johnpie and a johnpie was a piejohn (pigeon). Duly impressed by his powers of logic the father suggested that they go down to the lot and he would give him a chestnut horse. Proceeding to a chestnut tree in the lot the father picked up a horse chestnut and presented it to his son. Very much disappointed the boy insisted that his father had promised him a chestnut horse. His father replied that he had complied with his promise because by the rules of logic a horse chestnut was a chestnut horse.

And so by the irresistible rules of logic, Dealer's Transport Company by its constructive possession became the owner of the truck belonging to the United tSates. Likewise Clark on going into the actual possession of the truck became and was its owner at the time of the accident.

The Court can readily see where such arguments may lead and what unsound conclusions may be reached if they are upheld.

Certainly under the first division of the Code Section, substituted service could not be had. The same is equally true of the second division of the Act, because it plainly provides that substituted service may be had against the owner, not the possessor of the vehicle, who operates it in person or by its or their agents without extending the provision to any other persons than those named in the Act.

The statute construed in *Jones* v. *Pebler*, 371 Ill. 309, 125 A. L. R., 451, and cited by counsel for respondents, differs in several respects from the Alabama statute, although counsel insist that the provisions are similar. The statute construed in that case provides that the mere *use* or *operation* by a non-resident of a motor vehicle on a highway in the State of Illinois serves automatically to appoint the Secretary of State as an attorney to receive service of process, and the "use" or "operation" the law ordains, shall be a significance that such substituted service shall be of the

same legal force and validity as personal service. 125 A. L. R., 455.

In construing the statute the Court held that the word "non-resident" as used in the statute included every non-resident, individual or corporation, owner or *non-resident owner* using and operating a motor vehicle over Illinois highways. 125 A. L. R., 455.

As held by the Illinois Court, the statute of that state differed materially from the New York statute followed in many respects by the Alabama statute. As to this the Illinois court said:

> "Moreover a comparison of the Illinois statute with the New York statute construed in the O'Tier case disclosed important points of dissimilarity. While the New York statute made only the "operation" by a non-resident of a motor vehicle on a public highway of the State, basis of constructive service, the Illinois statute employs the more comprehensive expression '*use and operation*'." (Emphasis supplied.)

The Illinois Court also referred to the case of *Brown* v. *Cleveland Tractor Company*, 265 Michigan 475, 251 NW. 557, based on an act of the Michigan Legislature, stating that it was practically identical with the New York statute. In the case of *Brown* v. *Cleveland Tractor Company*, it was held that the Michigan Court restricted the application of the statute to non-residents who *personally* drove their automobiles. Referring to this the Illinois Court stated that the New York and Michigan statutes construed in *O'Tier* v. *Sell* and *Brown* v. *Cleveland Tractor Company* as applying only to the operation by non-residents of motor vehicles on public highways in those states had both since been amended by adding the words:

> * * * "or the operation on a public highway in this state of a motor vehicle—owned by a non-resident if so operated with his consent, express or implied."

In the opinion the Court also said:

> "Neither statute incorporated the word '*use*' which is employed three times in the Illinois law. On the other hand the word 'owner' does not appear in our statute." 125 A. L. R. 456.

It will thus be seen that the Illinois statute construed in *Jones* v. *Pebler* was quite different from the New York and Michigan statutes and that the Alabama statute is substantially the same as the Michigan and New York statutes before they were later amended in that the word "operation" alone is used and the word "use" nowhere appears in the Alabama Act.

The Court held that because the Illinois statute employed the more comprehensive expression "use and operation", this was sufficient to authorize constructive service as to the non-resident who permitted an agent to *use* and operate the motor vehicle in the State of Illinois. It follows that *Jones* v. *Pebler* is not opposed to, but sustains Petitioner's contentions.

Dealer's Transport Company Was a Foreign Corporation, Not Doing Business in Alabama at the Time Constructive Service Was Had on the Secretary of State. Therefore Such Service Was Void.

It is conceded that petitioner was not engaged in business in Alabama at the time service was had on the Secretary of State.

The only business petitioner had was in Atlanta. It had not transported or delivered through Alabama any vehicle except for military purposes for the United States—nothing but military trucks out of Atlanta. They had no civilian business in Atlanta. It was military (Reis' testimony R. 36).

Coming to Atlanta was under the instructions of the government for the express purpose of delivering motor trucks

for military purposes. Petitioner did not engage in or endeavor to engage in any other business except that (Reis' testimony R. 112-13).

To render a foreign corporation subject to the jurisdiction of State courts, it must be engaged in business in the State at the time process is served. This is sustained by an unbroken line of Federal and State decisions.

As the principle is so well settled, we deem it necessary to quote only a few excerpts from some of these decisions bearing directly on the point:

> "In order to hold a foreign corporation, not licensed to do business in a State, responsible under the process of a local court, the record must disclose that it was carrying on business there at the *time of the attempted service.*" (Emphasis supplied)
>
> *Consolidated Textile Corporation* v. *Gregory*, 289 U. S. 85, 77 L. Ed. 1047.

At the time of the service petitioner was not licensed to do business in Alabama, had not complied with the requirements of Section 232 of the State Constitution to do business and was not engaged in business in the State.

> "It will be observed that the validity of the service upon an agent of a foreign corporation within the state depends upon whether the corporation was (1) doing business by an agent in the exercise of *its corporate function;* (2) at the *time* suit was perfected by the service made; and it is not to be tested by the *time* the process issued, or was delivered to the Sheriff, but *at the time he served* that process the corporation was doing business, an essential to service of process in the case." (Emphasis supplied)
>
> *Ford Motor Company* v. *Hall Auto Company*, 226 Ala. 385, 388, 147 So. 603, 606.

The above decision clearly holds that the corporation must be doing business by an agent in the exercise of its

corporate functions. Certainly Dealer's Transport Company was not doing business by the Secretary of State as its agent in the exercise of its corporate functions at the *time* service of process was made.

> "* * * the corporation must be doing business in the State when the process was served by the Sheriff, not only when it was delivered to the Sheriff."
>
> *Davis* v. *Jones*, 236 Ala. 684, 687, 184 So. 896, 899.

> "The main question for decision is whether, *at the time of the service of process*, defendant was doing business within the State in such manner and to such an extent as to warrant the inference that it was present there." (Emphasis supplied)
>
> *Cannon Manufacturing Company* v. *Cudahy Pkg. Co.*, 267 U. S. 333, 334-5; 69 L. Ed. 634, 641.

> "The sole question for decision is whether, *at the time of the service of the process*, defendant was doing business within the district in such manner as to warrant the inference that it was present there. (Emphasis supplied)
>
> *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171, 172; 67 L. Ed. 594, 595.

Section 192, Title 7, Code of Alabama 1940, formerly Section 9426, Alabama Code 1923, provides that where the foreign corporation has complied with Section 232 of the Alabama Constitution and the designated agent shall die, resign, remove from the State, or his authority shall cease and no other agent shall be designated by the corporation, service of process issued against it may be made upon the Secretary of State.

Construing this section the Alabama Supreme Court has held its provisions do not apply to cases where the foreign corporation *is not engaged in business in the State at the time of service on the Secretary of State.*

Referring to these provisions of the Code Sections, the Court in *Cowikee Mills* v. *Georgia-Alabama Power Company*, 216 Alabama, 222, 113 So. 4, in affirming the lower Court's ruling sustaining defendant's plea in abatement, said:

> "But these provisions must be viewed *in the light of the Fourteenth Amendment to the Constitution of the United States, known as the due process clause* of the Constitution as interpreted by the Federal Supreme Court. So viewed, we are of the opinion the language must be held applicable only to those foreign corporations *still engaged in business in this state, and subject to the jurisdiction of our court.*" (Emphasis supplied)

Authorities Cited for Respondents.

We desire to impress upon the Court that we are not attacking the constitutionality of the Alabama constructive Service Statute. Our contention is that, being in derogation of the common law, the statute must be strictly construed and can not be invoked except in the cases expressly authorized by its provisions.

Nor are we insisting that a foreign corporation is entirely immune from suit where it fails to comply with Section 232 of the Alabama Constitution as to engaging in business in the State. Even if it may not have complied with this section of the Constitution, it may still be subject to suit if in point of fact it is engaged in business, although not licensed in the state at the time suit it brought.

Examination of authorities cited by counsel for respondents as to this phase of the case will show that they are not in point.

Citation by counsel and their application of the principles of law announced in *St. Mary's Oil Engine Company* v. *Jackson Ice & Fuel Company*, 224 Alabama 152, 155; 138 So. 834, are misleading. It is true the Court in that case

correctly holds that a foreign corporation, although it has not complied with the provisions of Section 232 of the State Constitution, may be sued in the State Courts, but the decision goes farther and expressly holds that to authorize such suit, the foreign corporation must be doing business by agent in the State *at the time* the process is served. In the case referred to, service of process was upon defendant's office manager and bookkeeper, Hucke. Motion to quash was practically upon the same grounds as in the case at bar. The proof showed that at the *time of service* Hucke was the agent of defendant corporation, that he was in Alabama, on defendant's business and was transacting business for it *at the time suit* was brought and *served on him*. The Court held:

> "The evidence offered on the trial of the motion to quash the service was sufficient to support the conclusion that defendant's office manager and bookkeeper was sent into this state by the corporation to visit its customers, collect accounts, make sales, and to call upon the president of plaintiff corporation and settle and adjust the controversy out of which this litigation arises, and he was engaged in and about the duties of his agency *when served;* that this service on said Hucke was authorized by the statute, and this service in connection with the fact *that the defendant was doing business in Alabama* constituted due process of law. Therefore, we are of opinion that the motion was denied without error." (Emphasis supplied.) 224 Ala. 158.

The difference between the St. Mary's Oil Engine Company and the case at bar is that in the *St. Mary's Oil Engine Company* case, that company was doing business in the State of Alabama by agent and the agent was served at the time the company was engaged in business.

In the case at bar, Dealer's Transport Company was not engaged in business in Alabama at the time service

was had on the Secretary of State and had not been engaged in business prior to the service of process.

Counsel also cite *Parker* v. *Central of Georgia Railway Company*, 233 Ala. 149, 170 So. 333. This decision is not in point and again the citation is misleading.

The facts in the *Parker* case are entirely different from the case at bar. Prior to going into the hands of a receiver the Central of Georgia Railway Company had filed with the Secretary of State as required by Section 232 of the Constitution an instrument designating Montgomery as its known place of business and also designating an authorized agent residing there. It had not prior to the bringing of the suit filed any instrument abandoning or changing the place of business, or in any way amending the designation of its place of business and appointment of its agent.

The question of sufficiency of personal service was not even raised. As to this the Court, 233 Alabama 151, said:

> "We notice that appellee *does not raise* any question as to the sufficiency of the service to justify a personal judgment. Indeed, counsel in brief for appellee for the purpose of appeal concede that the service was effected." (Emphasis supplied.)

At page 153 of the opinion, the Court said:

> "Personal service here is not denied."

The validity of the service in the *Parker* case was not questioned. In the case at bar, it was challenged from the beginning.

Petitioner Was Not Liable for the Damages Assessed As Penalties in the Two Death Cases.

Under the facts petitioner and Clark, its employee, were governmental agents, acting under military orders in trans-

porting for military purposes trucks belonging to the Government to be used in the prosecution of the war. They were acting under governmental instructions and restrictions and a government bill of lading issued by military authorities of the government in Atlanta as consignors with directions to deliver the trucks to the Quartermaster in New Orleans as consignee. There was no other cargo and the sole representative of the government at the time the accident occurred was Clark, the driver of the truck involved in the accident and also in charge of the entire convoy of five trucks. Stripped of all camouflage, with which respondents attempt to surround the affair, all petitioner did was to furnish the driver for the transportation and delivery of the trucks, for which it was to be paid after delivery and after the surrender of the government bill of lading and after the charges for transportation had been audited. Although a common carrier, petitioner became the agent of the government and was subject to the orders and directions of the government and its military authorities. If Clark and petitioner committed any wrong, they were amenable to the federal government and that government alone.

Under the facts unquestionably there was a clash between State Sovereignty and Federal Sovereignty, resulting in delaying the transportation of the trucks to their destination, the arrest and imprisonment of Clark, the driver, imposition of a fine against him for a petty misdemeanor followed by twenty days imprsonment for nonpayment and continued imprisonment until the Grand Jury failed to indict him upon the charge of manslaughter. This was followed by the suits for penalties and the imposition of civil fines aggregating $16,500.00 under the Alabama Homicide Statute. In their earnest plea that

State Sovereignty should prevail, counsel for respondents ask:

> "What has petitioner done that has made it immune from the laws of Alabama and placed it upon a pedestal armed with a license to wrongfully take the lives of two of our citizens and go unwhipped of justice?"

The answer is that as above stated, if wrongs were committed, petitioner under the facts is answerable to the federal government under whose authority it and Clark were acting, whose sovereign power has been challenged by the State and whose efforts to wage war and save the country from destruction have been impeded and retarded.

It was and is for the Federal Government to say what wrongs and crimes if any have been committed and what punishment should be meted out.

In their brief counsel for respondents assert:

> "The law is that a government official is liable for its wrongs, war or no war, unless expressly exempted from such liability by some law."

As a general proposition, this is not denied. They cite several authorities to support their contention. The question of general liability is not an issue in this case. The insistence is that, because of conflict between Federal and State Sovereignty, petitioner and Clark were amenable only to the federal government for their acts and any wrongs committed by them, because they were agents of the government. The Nation was at war and they were engaged in carrying out military orders at the time of the accident. The authorities cited by Counsel are not in point. They relate to acts committed in times of peace.

Counsel also attempt to argue the alleged acts of negligence on the part of Clark. That is not involved in the

issues presented to this Court for decision. The complaints filed by respondent allege that he was acting within the line and scope of his authority. This being true, whatever acts of negligence were committed and the laws governing the same are federal questions to be determined by federal law. Where the state law is in conflict, it must yield.

We may say here, however, that should the petition for certiorari be granted, and it is permissible to open up the entire case, the facts in the record will show that the accident could not have happened as contended for by respondents and that the physical facts corroborated by other evidence when fairly considered show that Clark was not guilty of negligence.

It is insisted that petitioner was not a governmental agent and subject to governmental and military orders because it was not actually taken over by the government. This was not necessary. Under the statutes cited in the petition for certiorari and supporting brief, the government was clothed with ample power to requisition the services of petitioner without a formal order taking it over. All it had to do was to commandeer or requisition the services of petitioner. This was done. This was all that was necessary.

Roxford Knitting Co. v. *Moore & Tierney,* 265 F. 177.

Neither was it necessary for the government to actually take petitioner over in order to protect it from penalties imposed by state law.

Astoria Light H. & P. Co., 30 A. L. R. 1458.

At the time of the accident more than three thousand American soldiers had been killed at Pearl Harbor and others were left wounded. Many lives had been lost in the gallant attempt to hold Bataan and Corregidor and other

soldiers and sailors had gone down in the Coral Sea, battling to save their country from destruction. In the wake of these battles were left widows and orphans and many wounded and maimed for life. The whole world was aflame from fires, kindled by despotic and cruel nations accompanied with threats of a Japanese Commander that they would write the terms of peace in the Capitol at Washington.

It was under these conditions that appellees insist that Clark, the representative and agent of the sovereign power of the Government, guarding the safety of one hundred and thirty million people was without right to pass a wagon on the nation's highway going at a snail's pace in order that he might accomplish the mission entrusted to him. It was under these conditions it is insisted that State sovereignty was supreme and that National sovereignty was not involved.

We respectfully insist that this contention is utterly lacking in merit.

The evidence does not show how long the trucks were delayed by the arrest and imprisonment of Clark, but this is not material. Even the slightest delay was a retardation of the war efforts in the phase of activity in which Dealer's Transport Company and Clark were engaged as agents of the government when the accident occurred. The all important matter requiring prompt attention was the expeditious delivery of the trucks in New Orleans for the prosecution of the war. Under these circumstances Clark should have been permitted to continue his trip to New Orleans in order that the trucks might be promptly delivered instead of arresting and imprisoning him and leaving the trucks stranded by the wayside.

As already stated, whether Clark was or was not guilty of negligence in so far as the State of Alabama and the parties to these suits are concerned is not a question to be

determined under the laws of Alabama. Such questions can only be settled under the laws of the United States.

The accident was unfortunate and of such a nature as to arouse sympathy for the unfortunate victims and their relatives. At the same time this government was and still is at war.

Railroads and other common carriers, including transportation companies are the chief facilities used by the government for transporting troops, war supplies, aeroplanes, motor vehicles and other implements of war necessary for carrying it on.

Without requisitioning their services, the government would have been powerless to transport troops, food, clothing, munitions and weapons of war, as well as the other implements and machinery indispensable in carrying the war to a successful completion.

In his syndicated newspaper article of September 12, 1943, Drew Pearson states that between Pearl Harbor and May 31, 1943, the Army Transportation Corporation moved more than twenty million U. S. Troops by rail for a total distance of seventeen billion miles.

While he does not give the information, the transportation of motor vehicles, food, clothing, war supplies, arms and munitions would present like staggering figures.

It is needless to say that in rendering these services and carrying out the orders of the government, mistakes are made, daily accidents occur and civilians are killed or injured. Each of the states probably has homicide statutes similar to those of Alabama. If suits in State Courts of the nature instituted in the instant cases are permitted and penalties inflicted, there is no reason why a railroad company conveying car loads of motor vehicles of the same nature as those involved in these suits can not be held liable for damages and penalties where engineers unfortunately kill civilians in the operation of the trains. There is no

reason why these engineers in such cases may not be dragged from their trains upon the happenings of the accidents and placed in jail upon criminal charges as in the instant cases and carriers sued for punitive damages under homicide statutes in the different states. If such be the law, there is no reason why a railroad company as a common carrier transporting a train load of soldiers to a battle front or to a port of embarkation, charged with the duty of using all possible speed, could not in case of accident be held up, its train left idle on the track, the engineer arrested and imprisoned on criminal charges preferred by the State, and suits for heavy damages be brought under the homicide statute as additional punishment to be inflicted on the agent of the Government. The same would also be true as to transport companies, serving the government in like manner.

In such cases no more deadly torpedoing of the Government's efforts to carry on the war can be imagined.

Had in the instant case, under the plaintiff's theory of State Sovereignty, the trucks in the convoy been filled with soldiers to be carried to a port of embarkation with limited time to reach it, the State would have had the same right as here exercised, in case of accident, to arrest and imprison Clark and thus stop transportation of the troops until it was too late for them to reach the point of embarkation. At the same time the State could also exercise its prerogative to impose additional fines and penalties by the institution of suits through administrators to enforce the Homicide Act and thus again punish the agents of the government and impede its prosecution of the war.

If the principles of law invoked by appellees are permitted to stand, a dangerous precedent will be set and suits of the nature instituted in these cases will be everywhere invited and the state will become a paradise for litigation of this kind.

The killing of two human beings and the seriously injuring of another is greatly to be regretted. The accident appeals to human sympathy and no doubt the sympathies of the jury were deeply aroused resulting in the verdicts complained of. Clark and the Dealer's Transport Company were agents of the government engaged in carrying out mandatory orders in aid of the prosecution of the war. The delivery of the trucks as speedily as possible was imperative. The authority of the government he was serving was supreme. At the time of the accident the greatest war the world has ever known was being waged. Issues involving the future of all civilized nations were at stake. The destinies not only of this nation of one hundred and thirty million people, but the fate of all nations and the preservation of a Christian civilization, two thousand years in the making, were all hanging in the balance and the end is not yet.

Under these conditions the sovereignty of this great nation was supreme and its power to call upon all organizations and commandeer their services was and is unquestioned. In the exercise of this supreme authority, state sovereignty is compelled to yield and all of its laws in conflict with national sovereignty must of necessity be suspended as long as the great struggle continues.

Respectfully submitted.

D. M. Powell,
Greenville, Alabama,
Counsel for Petitioner.

Of Counsel:
Claude E. Hamilton, Jr.,
New York City;
Powell & Hamilton,
Greenville, Alabama.